VIRGINIA LAW REGISTER

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Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS.

It has not been the custom of the REGISTER to comment editorially upon the death of any person, no matter how distinguished.

Frank W. Christian.

But the editor-in-chief cannot forbear putting upon record in a few brief words his own sense of the great loss the Commonwealth and the profession have sustained in the death of the distinguished Virginian whose name heads this article. Nor can it be out of place in a law periodical. For Frank Christian was a LAWYER: a lawyer devoted to his profession—serving it with a devotion and a constancy only equaled by his brilliancy. No call to position of dignity or of ease, no desire for wealth or fame or political honor, ever swerved him from the straight, hard road of the practise of the law. He looked neither to the right nor to the left, keeping before him as ever as a guiding star the fixed principle of his life—to be a high-minded, honorable, zealous, hard-working lawyer. And he died—well nigh in the harness—at the head of his profession in the State, honored by the Courts and the Bar alike. An antagonist to be feared only for his intellectual power and garnered wisdom; for he was a high man, a pure man, scorning indirect methods, winning cases because he deserved to win them, by the sheer force of a manly brain which knew how to use every weapon in the armory of the books. He knew the law and the reason thereof; his arguments upon the sure foundation of principles, laid the hewn stones of the court's decisions in the mortar of systematized reasoning and unanswerable logic, until the completed structure stood a monument of convincing reasoning, "four square" to every contrary wind. Pleasant in manner—persuasive— never arbitrary or dictatorial, he was a foeman worthy of any man's steel, but a courteous kindly one, whose victories left no sting save the inevitable one of defeat. He was a conscientious practitioner. No case entrusted to him was ever neglected or slurred over, no matter how

small the amount. It was the right of the case which appealed to him and to which he devoted himself. He was a generous lawyer, ever ready to give both his time and his talents to his younger brethren. He died just a little past life's meridian. His life though left "unrounded and incomplete of time," lacked nothing which the years could have added to it save increasing fame. We had the right to expect, it was our hope, that he should have remained with us for many years yet, the ornament of his profession and the pride of his people; but it was ordained otherwise and he has yielded, as we all must yield, to the immutable Law. High regard, honor, love, pleasant memories follow him into

> those benignant shadows,
> Whose darkness no good man need ever fear."

Affirmation by a Divided Court.

A very interesting question was raised in the petition for a rehearing in the case of Charlottesville & Albemarle Railway Co. *v.* Rubin, by etc., decided November, 1907. The Court refused a rehearing of the decision which affirmed the lower Court by an equal division—four judges only sitting. The interesting question was as to the effect of the Act of Dec. 31st, 1903, revising Section 3485 of the Code of 1887. Counsel for the petitioner praying a rehearing, filed a very able and learned argument, which we would be glad to reproduce if space permitted. They took the ground that there is now no Act of Assembly permitting affirmance by an equally divided Court and that in so entering the order of affirmance the Court exceeded its jurisdiction and the order so entered was void, and being void it was the duty of the Court to vacate and revise it during the term at which it was entered.

It was contended that whilst the Constitution provides for a Court of Appeals and prescribes the breadth of its jurisdiction, legislative enactment was required for the existence and jurisdiction of the Court. Of this there can be little doubt. Price *v.* Smith, 93 Va. 14, and cases cited therein. Section 3485 of the present Code which contains the Act of Dec. 31, 1903, providing the manner in which the Court can in the main exercise its functions is as follows·

"The appellate Court shall affirm the judgment, decree, or order if there be no error therein, and reverse the same in whole or in part, if erroneous, and enter such judgment, decree or order as the court whose error is sought to be corrected ought to have entered. The assent of at least three of the judges shall be required for the Court to determine that any law is or is not repugnant to the Constitution of this State or of the United States; and if in a case involving the constitutionality of any such law, not more than two of the judges sitting agree in opinion on the constitutional question involved, and the case cannot be determined without passing on such question, no decision shall be rendered therein, but the case shall be reheard by a full court; and in no case where the jurisdiction of the court depends solely upon the fact that the constitutionality of a law is involved shall the court decide the case upon its merits unless the contention of the appellant upon the constitutional question be sustained. Whenever the requisite majority of the judges sitting are unable to agree upon a decision, the case shall be reheard by a full bench, and any vacancy caused by any one or more of the judges being unable, unwilling or disqualified to sit shall be temporarily filled in the manner prescribed by law."

Previous to the Act of 1903, the Section read as follows:

"The Appellate Court shall affirm the judgment, decree or order if there be no error therein and reverse the same in whole or in part, if erroneous and enter such judgment, decree or order as the court whose error is sought to be corrected ought to have entered, affirming in those cases where the voices on both sides are equal: *Provided, however,* that in order to declare in any case any law null and void by reason of its repugnance to the Constitution of the United States, or the constitution of this state, it shall be necessary that a majority of the judges elected to the Supreme Court of Appeals shall concur."

By this section last quoted it was expressly provided that in case of a divided court the judgment should be affirmed. When the Statute was amended this proviso was left out, and the sentence commencing with "Whenever the *requisite majority* of the judges, etc.," added.

Did the omission of the clause providing for an affirmance when the voices are equal, and the addition of the last sentence

indicate an intention on the part of the Legislature to enact that thereafter the Court could not affirm a decree where there was an equal division of opinion? In the judgment of the writer there seems to be a very strong ground for such a construction of the Statute. The Legislature was presumed to know what the law was, and what they were deliberately doing. It surely, in view of the language of the Court in Somers *v.* Com., 97 Va. 759 "embraced the whole legislation on the subject to which it refers," and "wholly substituted" a statute "for all former statutes on the same subject," and therefore "whatever is embraced in it shall prevail and whatever is excluded is discarded and repealed." Affirmance by a divided Court was expressly provided for by the first statute; the second one deliberately excluded this proviso, and added a clause that looks very much as if it intended a majority of the Court, and only a majority to decide a question. The Legislature provided that if any of the judges was *"unable, unwilling* or *disqualified* to sit" any vacancy was to be temporarily filled in the manner prescribed by law. This would seem to indicate that the Legislature intended to enact that there should never be a time when anything less than a majority should decide a case. It may be contended that the language applied only to constitutional questions. It is true it follows distinctly after the provision as to how a constitutional question should be determined. But the clause providing for such determination is full and complete in itself, and needed no addendum. The last clause must therefore seem to be directed to all decisions of the Court, or to be superfluous. We shall therefore await with much interest the full opinion of the Court and trust that a written one will be handed down, for, as at present advised, the Statute needs a clear and express decision.

Suspicious Characters.

It is exceedingly refreshing in these days when the "Police Power" is invoked by so many Courts—even one as high as the Supreme Court of the United States—to uphold multitudinous rules and regulations, statutes and ordinances, the enforcement of which would have caused our sires of '76 to rebel against any authority—exceedingly refreshing it is to read the opinion of our Supreme Court in the case of Hill *v.* Smith, decided November 20th, 1907.

In this case Hill was arrested by an officer upon a warrant charging him with being a "suspicious character," and was duly incarcerated by a Police Justice. He sued out a writ of Habeas Corpus and was promptly discharged by the Court. Keith, P., delivering the opinion of the Court, holds, that it is proper for an officer to arrest a person if he has reasonable ground to suspect him of having committed a felony; but that as soon as arrested a specific complaint in writing should be formulated without unnecessary delay, informing the prisoner of the offense with which he is charged and that he may be held until the case is disposed of according to law, and if cause be shown by the Commonwealth, the hearing may be postponed not exceeding ten days.

This decision is of far more importance than appears upon a mere casual reading, for if there is one power which is more abused than another it is the police power. Jack London, in his book "Upon the Road" has drawn a graphic, and, we may say, a most horrible picture of his treatment by the police whilst posing as a tramp. He was arrested as a "suspicious character," duly convicted and sentenced as such and was hustled off to imprisonment at hard labor, laughed at when he wanted to send for counsel and served his term.

Whilst allowing for the exaggeration of an author writing for a purpose, we can well imagine a sub-stratum of truth in his statement; for no one can pick up a daily paper without reading of arbitrary arrests, "sweating" processes, examinations in "the third degree," and methods which read more like the methods of the Inquisition than those of the land of the "proud bird of freedom." Few lawyers in their lives have failed to see arbitrary and unnecessary arrests, and the liberty of the individual recklessly imperiled by an ignorant justice and a too zealous officer. It is upon the poor, the friendless, the helpless, that these outrages are perpetrated. "They are dumb before their shearers," as a witty lawyer once said, "because they have neither the requisite knowledge nor funds to open an advocate's mouth." Fortunate it is when their cause, like this of Hill's, can find a lawyer and a court to prove that not always because "clothed in rags," the life and liberty of the subject can be put in jeopardy.

Clerk's Certificates.

In the cause of Smith, etc., *v.* White, Trustee, etc., decided November 29th, 1907, our Supreme Court decided a point of interest and renders a decision of first impression in this State. The Court decides that the Clerk of our Courts has no authority to certify that a specific document does not exist in his office or that a particular entry was not made on his records. He must be sworn and examined just as any other witness. It has been such a common practice in this Commonwealth to have the clerk certify the nonexistence of a particular document or entry in his office, that at the first blush this decision will take most lawyers by surprise. But its correctness is indisputable and is sustained both by the common law and the simplest logical principles of evidence. We are glad to see the former practice condemned, and trust the members of the Bar will take due notice thereof.

"Virginia Appeals."

We regret to learn that the Hon. W. W. Scott has discontinued his connection with this publication. A writer of pure, concise, clear English, with a happy faculty of seizing the salient points decided, his syllabus to each case was a model. We trust his successor will continue his work in the same style and spirit.

Federal Employers' Liability Act.

In McCulloch *v.* Maryland, 4 Wheat. 316, Chief Justice Marshall said: "Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." And this "painful duty" has often since been performed by that court, and notably in that decision, recently rendered, in which they held the employers' liability act unconstitutional. The court declares the general purpose of the law to be good and this can be denied by no one, but the expediency of such a measure, in light of the great opposition to centralization, may well be questioned. Why should this power be exercised by Congress, when it seems to relate solely and especially to state affairs? It is a matter of grave doubt whether any

act at all can be framed that can stand the test, though it is suggested by Mr. Justice White that it is practicable. One of the judges, at least, questions whether this is commerce at all, and the following language of the Chief Justice in a recent case, speaking of the power and sovereignty of a state, bears him out. It was said: It cannot be denied that the power of a state to protect the lives, health and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its domain," is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. Such was the purpose of this act, "to protect the lives of citizens of the state." If another attempt is made to devise an act that will stand the test, its framer will no doubt carefully confine its provisions to employers and employees actually engaged in interstate commerce. Within these limits some members of the court appear to recognize the authority of Congress to act. The President in an address delivered at Jamestown last summer, evidently referring to the two cases in which the court denied the constitutionality of act, but which were only pending at the time, uses the following language: "Let me point out the extreme unwisdom of the railway companies in fighting the constitutionality of the National employers' liability act. No law is more emphatically needed and it must be kept on the statute books in drastic and thoroughgoing form. The railroads are prompt to demand the interference and to claim the protection of the Federal courts in times of riot and disaster, and in turn the Federal government should see to it that they are not permitted successfully to plead that they are under the Federal laws when thereby their own rights can be protected, but outside of it when it is invoked against them in behalf of the rights of others. * * * The law should be such that it will be impossible for the railroads successfully to fight it without thereby forfeiting the right to the protection of the Federal government under any circumstances." Notwithstanding this forceful language of the President, it is altogether a vain expectation that Congress, should it undertake to re-enact this law, will govern its actions by anything else than the Federal Constitution and public policy; the good or bad motives of rail-

road are outside the question. A law providing that if the railroads fight this enactment, the government would withhold its aid from them in putting down strikes, would be as unconstitutional as the laws frightening or attempting to frighten the railroads out of their rights to remove causes to the Federal courts. We would be gratified to see a constitutional enactment on this subject, but are compelled to doubt its success in any form.

Special Assessments for Street Improvements.

The leading article this month, reviewing recent decisions in this state relating to cities and towns, deals learnedly with a question of unusual and growing interest to the citizens of this commonwealth, and will fully repay careful study. With much that he says we heartily concur, but we are not in accord with him in his unqualified approval of the adoption in this state of the front-foot rule as a basis of assessment upon abutting owners for street improvement. To our mind it is eminently unjust unless it is carefully confined to such improvements as have a permanent or substantial effect upon the value of the premises such as paving, and sewers as was the case in Adams *v.* City of Roanoke. But here lies the danger. And it is altogether likely that such a rule will furnish a precedent for the imposition of other burdens such as keeping streets and sidewalks free from ice, mud, water, snow, dust, etc., or even street sprinkling, for the convenience of the traveling public on no better ground than that a well kept street is more desirable for residence than one which is not. It must be conceded, however, that the cases dealing with this question are hopelessly conflicting. For example, in State *v.* Reis, 38 Minn. 371, in which the court said that although the element of permanence is lacking, there is no difference in principle between sprinkling and paving, inasmuch as it cannot be claimed that the latter is eternal, the following language is used: "We are unable to see any difference in principle between the work of street sprinkling, the results of which, unless repeated, last but a day, and the construction of a block pavement or wooden sidewalk, which wears out or decays and has to be rebuilt every few years. When a pavement or sidewalk has worn out, the future value of the property is not enhanced by it, any more than it is by

street sprinkling when that ceases. Neither do we see that it makes any difference whether the substance applied to the surface of the street is wood, which has to be renewed every few years, or water, which has to be applied daily. Each benefits the adjacent property as long as it lasts, and no longer. It is not the agency used, or its comparative durability, but the result accomplished, which must determine whether a work is an improvement in the sense in which that word is here used." This rule was followed in Sears *v.* Boston, 173 Mass. 71, but with apparent reluctance, and the court evidently recognized the gravity of the crucial question, for it says: "It is a grave question whether the benefit that comes to abutting property from the watering of the street in front of it is such an improvement to the property that it can be made the subject of an assessment upon it. There must be a real, substantial enhancement of value growing out of a public work to warrant an assessment of special taxes upon particular estates on account of it. The watering of streets produces only transitory effects, and makes no permanent change in the condition of the property." But on the other side is the well-considered case of Chicago *v.* Blair, 149 Ill. 310, 24 L. R. A. 412, holding that the sprinkling of streets is not a local improvement subject to local assessment, because the only basis upon which either special assessment or special taxation can be sustained is that from the proposed local improvement the property subjected to the tax or assessment will be enhanced in value to the extent of the burden imposed. And the court in this Illinois case uses the following unanswerable argument against any contention that may be made that such a fleeting benefit can properly be made the subject of special assessments: "In the nature of things, the sprinkling is only useful while the work is continued. In a few hours the beneficial effects are gone, and the property is worth no more than before the street was sprinkled. It is insisted, however, that all improvements—the building of sidewalks, the paving of streets, of however lasting material—are evanescent, and in a few years at the most will necessarily require renewing, and that it makes no difference whether it be water put upon the street, or wood or granite; that all alike are but temporary in character. In a sense this is true, but not in a practical sense. It is common experience that well-paved streets and convenient and durable sidewalks, furnishing

access to property, do in fact enhance its market value. It is however, insisted that the sprinkling of the streets during the summer months renders the occupation of adjacent property more enjoyable and comfortable, and that therefore the property is enhanced in value. Doubtless the same result would follow by placing vases at convenient points on the street, to be filled every morning with fresh-cut flowers, or by open-air concerts, in which music should be selected with reference to the taste of the adjacent dwellers. So the employment of an efficient police force, whereby greater safety was felt, would add to the enjoyment and comfort of the persons residing upon the street. The proper watering and clipping of the grass upon lawn and terrace, the removal of garbage from the premises, besides saving expense to the occupant, would add to the enjoyment, and possibly healthfulness, of the locality. These all might be improvements, and increase, while they continued, the desirability of property in their locality. But they are not improvements, either of the property or of the street, within the legislative contemplation when granting power to make local improvements by special assessment."

To our mind this reasoning leaves no room for any difference of opinion, and such too has been the opinion of most of the courts in the best considered decisions. In short a careful reading of the cases will reveal an increasing opposition on the part of the courts to extend the front-foot rule, and to confine it to the cases which gave it birth, namely, to the paving of streets and sidewalks. The exercise of this extraordinary power is inseparable from the idea of permanency, and must be of that character which, presumptively, works out an enhancement of the market value of the property assessed. We trust that when the case arises, our court will not be unmindful of the words of Justice Phillips in New York Life Ins. Co. *v.* Prest, 71 Fed. 816, that "the sole foundation for the exercise of this extraordinary power, so often pressed to the utmost verge of toleration by these municipal governments, rests on the fact or assumption that it operates in the nature of conferring a practical permanent benefit upon the property itself, independent of any fancy, whim, or caprice of the occupant," and confine it within its original bounds.